

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

PETER J. FINK,)	
)	
Appellant,)	Case No. 07R-120
)	
v.)	DECISION AND ORDER REVERSING
)	THE DECISION OF THE CASS COUNTY
CASS COUNTY BOARD OF)	BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Peter J. Fink ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on June 6, 2008, pursuant to an Order for Hearing and Notice of Hearing issued February 26, 2008. Commissioners Warnes, Salmon, and Hotz were present. Commissioner Wickersham was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code ch.4 §11 (10/07). Commissioner Warnes was the presiding hearing officer.

Peter J. Fink was present at the hearing without legal counsel.

Nathan B. Cox, County Attorney for Cass County, Nebraska, was present as legal counsel for the Cass County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on

the record or in writing. The final decision and order of the Commission in this case is as follows.

I. ISSUES

The Taxpayer has asserted that actual value of the subject property as of January 1, 2007, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2007.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2007.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as BEAVER LAKE LOT 62A REPLAT in Cass County, Nebraska, ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Cass County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: BEAVER LAKE LOT 62A REPLAT, Cass County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$117,250.00	\$117,250.00	\$117,250.00
Improvement	\$141,833.00	\$70,615.00	\$119,678.00
Total	\$259,083.00	\$187,865.00	\$236,928.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. The Taxpayer was served with a Notice in Lieu of Summons and duly answered that Notice.
7. An Order for Hearing and Notice of Hearing issued on February 26, 2008, set a hearing of the appeal for June 6, 2008, at 9:00 a.m. CDST.

8. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
9. Actual value of the subject property as of the assessment date for the tax year 2007 is:

Land value	\$117,250.00
Improvement value	<u>\$110,038.00</u>
Total value	<u>\$227,288.00.</u>

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over exempt issues raised during the county board of equalization proceedings. *Arcadian Fertilizer, L.P. v. Sarpy County Bd. of Equalization*, 7 Neb.App. 655, 584 N.W.2d 353 (1998).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in

section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).

4. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).
5. “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
6. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
7. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
8. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1.
9. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
10. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show

uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

11. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
12. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
13. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
14. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

15. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
16. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987) (citations omitted).
17. The presumption remains until there is competent to the contrary is presented at which point the presumption disappears. From that point forward, the reasonableness of the valuation fixed by the County Board becomes one of fact based on all of the evidence presented. *Garvey Elevators, Inc. v. Adams County Bd. Of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).
18. The Commission can grant relief only if there is clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See, Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006), and e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
19. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

20. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
21. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
22. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
23. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
24. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
25. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981).

IV. ANALYSIS

The subject property is a residential lake lot which has been improved with a one-story residence built in 1978. (E8:3).

The Taxpayer has appealed both the valuation of the subject property as well as alleging that taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of other real property.

The reasons for the Taxpayer's initial protest to the County Board and for his appeal are itemized in his writing shown in Exhibit 1 page 4 and Exhibit 1 page 5 and duplicated in Exhibits 2 page 1 and Exhibit 2 page 2 and Exhibits 8 page 8 and Exhibit 8 page 9.

The County Assessor inspected the subject property subsequent to the Taxpayer's filing of his protest to the County's notice of valuation of \$259,083. The inspection verified some of the concerns of the Taxpayer and resulted in a new opinion of actual value of \$236,928. Exhibit 8 page 1 shows that the County adjusted its opinion of value after reducing the condition of the subject property to "fair" and adding an additional 10% functional depreciation.

In addition, the County stipulated during the hearing on this appeal that an error had occurred in the calculation of the County's opinion of value due to a duplication of the valuation for the garage as shown on Exhibit 8 page 3. The parties stipulated that the County's opinion of the actual valuation of the subject property should be reduced by \$9,640 resulting in a new valuation of \$227,288. The Commission finds that this new opinion of actual value by the County is to be given great weight.

The Taxpayer testified that despite the adjustments the County had made to its initial determination of actual value, \$259,083, to \$227,288, that further reductions were warranted. The Taxpayer testified that his initial concern about the square footage of the subject property was corrected to 1,207 square feet gross living area and 791 square feet of basement area as shown in Exhibit 8 page 3. This correction can be compared to the area used in Exhibit 3 page 2.

The Taxpayer testified that he did not have 2 fireplaces or 1 two sided fireplace as shown on Exhibit 8 page 3. The Commission notes that the abbreviation "2/S" for this entry means two story and not two sided.

Another issue testified to by the Taxpayer was that wood deck had been removed from the subject property, but the Taxpayer agreed that the wood deck of 440 square feet shown on Exhibit 3 page 2 was not being valued as shown on the revised property record card, Exhibit 8 page 3.

Other deficiencies that the Taxpayer alleges that should reduce the actual value of the subject property include water and termite damage. The Taxpayer did not have an itemization to repair the roof or to repair termite damage. The Taxpayer did provide proposals for the cost to repair some of the damage, Exhibits 4 page 1, Exhibit 6 page 1, and Exhibit 7 pages 1 & 2 and alleged damage as shown in photographs, Exhibit 8.

The Taxpayer did not provide evidence of the diminished actual value to the subject property based on the alleged damage. The Commission notes that the cost to repair is not a direct indication of a change to the actual value of a parcel. It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing

alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value. *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637 (1998). The Commission finds that there is confusion and uncertainty in the evidence of whether there is additional damage to the subject property which is has not been adjusted for by the County Assessor. The burden to prove this fact rests with the Taxpayer.

A second issue in this appeal is that the Taxpayer is alleging that taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of other real property, in particular that property shown in Exhibit 3 page 1. "Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. The purpose of equalization of assessments is to bring assessments from different parts of the taxing district to the same relative standard, so that no one part is compelled to pay a disproportionate share of the tax. Where it is impossible to secure both the standards of the true value of a property for taxation and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. If a taxpayer's property is assessed in excess of the value at which others are taxed, then the taxpayer has a right to relief. However, the burden is on the taxpayer to show by clear and convincing evidence that the valuation placed upon the taxpayer's property when compared with valuation placed on other similar property is grossly excessive." *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597, 597 N.W.2d 623, 635 (1999).

The parcel shown on Exhibit 3 page 1 is alleged to be comparable to the subject property; however the Taxpayer testified that the alleged comparable property had a “large wrap around deck” and more square feet, yet its assessment was less than the subject property. (E1:5) The difference in assessed taxable valuation between the two properties was \$.34 per square foot. Id.

The Commission’s review of the alleged comparable property, Exhibit 3, to the subject property, Exhibit 8, shows inconsistencies with the use of this property to evidence a basis for an equalization argument. First, the Commission notes that the Taxpayer is attempting to calculate an assessed valuation per square foot using a total of the gross living area (1st floor) added to the square footage of the basement. The two areas of the house are valued differently and the alleged comparable property has a basement area of 1,232 square feet while the subject property has a basement area of 791. Exhibit 3 page 2 and Exhibit 8 page 3. Second, the rating of the quality of the two properties is different with the alleged comparable property having a rating for quality of Average + , Exhibit 3 page 2, and the subject property having a rating of Average. Differences are noted in depreciation with 15% depreciation used for the property in Exhibit 3, and 25% for the subject property, Exhibit 8 page 3. Other differences exist between the properties and the Taxpayer has not made any adjustments for these differences.

Most notable to the Commission is that the Taxpayer is using a comparison of the assessed valuation of an alleged comparable property to the subject property. This is not an approved method of comparing actual value between the two properties. The Taxpayer contends that the actual or fair market value of the subject property should be determined based on the taxable or “assessed” value per square foot of other parcels. A Taxpayer wishing to use taxable

“assessed” values to prove actual or fair market value must show that the approach used is a professionally approved mass or fee appraisal approach and demonstrate application of the approach.

A determination of actual value may be made for mass appraisal and assessment purposes by using approaches identified in Nebraska Statutes. Neb. Rev. Stat. §77-112 (Reissue 2003). The approaches identified are the sales comparison approach, the income approach, the cost approach and other professionally accepted mass appraisal methods. *Id.* Comparison of assessed values is not identified in the Nebraska Statutes as an accepted approach for a determination of actual value for purposes of mass appraisal. *Id.* Because the method is not identified in statute, proof of its professional acceptance as an accepted appraisal approach would have to be produced. *Id.* No evidence has been presented to the Commission that comparison of assessed values is a professionally accepted mass or fee appraisal approach.

The Taxpayer in this case asks the Commission to presume that the taxable “assessed” value of each offered comparable is equal to its actual value. A presumption can arise that an assessor properly determined taxable “assessed” value. *Woods v. Lincoln Gas and Electric Co.*, 74 Neb. 526, 527 (1905), *Brown v. Douglas County*, 98 Neb. 299, 303 (1915), *Gamboni v. County of Otoe*, 159 Neb. 417, 431, 67 N.W.2d 489, 499 (1954), *Ahern v. Board of Equalization*, 160 Neb. 709, 711, 71 N.W.2d 307, 309 (1955). A presumption can also arise that a County Board’s determination of taxable “assessed” value is correct. *Constructor's Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000). A presumption is not, however, evidence of correctness in and of itself but may be classified as a principle of procedure

involving the burden of proof. See, *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).

The weight of authority is that assessed value is not in and of itself direct evidence of actual value. See, *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974). If however the “taxable ‘assessed’ value comparison approach” was shown to be a professionally accepted approach for determination of actual value, and that the taxable “assessed value of the proposed comparables was equal to actual value, further analysis would be required. Techniques for use of the approach would have to be developed. Techniques used in the sales comparison approach are instructive. In the sales comparison approach, a sale price is an indication of actual value for a sold property but must be adjusted to account for differences between properties to become an indicator of actual value for another property. *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, Chs 17, 18, 19, (2001). An analysis of differences and adjustments to the taxable “assessed” value of comparison properties would be necessary to obtain an indication of actual value for a subject property. See, *DeBruce Grain v. Otoe County Board of Equalization*, 7 Neb.App. 688, 584 N.W.2d 837, (1998). No adjustments or analysis of adjustments necessary to compensate for differences between the subject property and the taxable “assessed” values of other parcels was presented. The Taxpayer did not provide sufficient evidence of the actual value of any comparable properties.

The Commission, upon review of all of the evidence presented, finds that the Taxpayer has provided competent evidence to meet his burden to rebut the presumption that the County Board faithfully performed its duties or had acted on sufficient competent evidence to justify its decision. The Commission has reviewed all of the evidence presented and finds that

the Taxpayer has shown by the reasonableness of the evidence a different taxable valuation and has proven by clear and convincing evidence that the County Board's decision was arbitrary or unreasonable. The appeal of the Taxpayer is approved to the extent that the taxable valuation of the subject property for 2007 is \$227,288.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Commission finds that the Taxpayer has provided competent evidence to meet his burden to rebut the presumption that the County Board faithfully performed its duties or acted on sufficient competent evidence to justify its decision.
4. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be vacated and reversed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2007, is vacated and reversed.
2. Actual value of the subject property for the tax year 2007 is:

Land value \$117,250.00

Improvement value \$110,038.00

Total value \$227,288.00.

3. This decision, if no appeal is timely filed, shall be certified to the Cass County Treasurer, and the Cass County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.
7. This order is effective for purposes of appeal on July 21, 2008.

Signed and Sealed. July 21, 2008.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.